IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 353.

HENRY S. HASKINS, as Receiver for the TUSCARORA-NEVADA MINES COMPANY, a corporation,

Petitioner,

v.

ROY F. ROSEBERRY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS F. RYAN,
JOSEPH M. HARTFIELD,
EUGENE FREDERICK ROTH,
Counsel for Petitioner.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Henry S. Haskins, as receiver for the Tuscarora-Nevada Mines Company, a corporation, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Ninth Circuit entered in the above case on May 7, 1941, affirming a decree of the United States District Court for the District of Nevada.

Opinions Below

The opinion of the District Court (R. 151-155) is reported at 29 F. Supp. 724. The opinions of the Circuit Court of Appeals (R. 206-224) are reported at 119 F. (2d) 803.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on May 7, 1941 (R. 224-225). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (U. S. C., Title 28, Section 347).

Questions Presented

1. May requirements imposed by decisions of this Court, in connection with the sale of property for state taxes while it is in the custody of a court of the United States, be dispensed with by the legislature of the State of Nevada?

2. Shall the principle, announced by this Court in several decisions, that property in the custody of a federal court may not be sold for delinquent state taxes without the prior permission of such court, or its subsequent consent or approval, now be abandoned?

3. May title to property be gained by adverse possession while that property is in the custody of a court of the United States? (This is an important question of federal law which has not been, but should be, settled by this Court.)

4. Can a tax deed, admittedly void when executed and delivered, because the property described therein was then and at the time of the tax sale under active administration in a federal court receivership, be regarded as sufficient to set in motion a special statute of limitations, or to furnish a basis for a claim of title founded on adverse possession under color of title?

5. May the courts of the United States ignore Section 8512 of the Nevada Compiled Laws, 1929, and the construction which the Supreme Court of Nevada has placed on Section 8508 of the said Nevada Compiled Laws?

6. Will mere lapse of time, coupled with nothing more than fruitless expenditure of money by an adverse claimant, constitute laches barring recovery of property by the owner thereof, where the owner has no notice of the adverse claim, and there is no prejudice to the adverse claimant through loss of evidence, change of title, intervention of innocent equities, increase in the value of the property, or other equitable factor, and the expenditures of money by the adverse claimant result in no enhancement of the value of the property, and hence in no unjust enrichment of the owner if he is allowed to recover?

7. May judgment be entered in favor of the defendant, on the ground that the plaintiff's cause of action is barred by the statute of limitations, in a case in which the defendant has not affirmatively pleaded such defense, although required to do so by Rule 8(c) of the Federal Rules of Civil Procedure, and the plaintiff has neither expressly nor impliedly consented to the trial of the action as if such defense had been pleaded?

Statutes Involved

The portions of the section of the revenue laws of the State of Nevada (Section 6449, Nevada Compiled Laws, 1929) on which the decision and majority opinion in the Circuit Court of Appeals are based read as follows:

> "No tax heretofore or hereafter assessed upon any property, or sale therefor, shall be held invalid by any court of this state on account of any irregularity in any assessment, or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, or on account of any other irregularity, informality, omission, mistake or want of any matter of form or substance in any proceedings which the legislature might have dispensed with in the first place if it had seen fit so to do, and that does not affect the substantial property rights of

persons whose property is taxed; and all such proceedings in assessing and levying taxes, and in the sale and conveyance therefor, shall be presumed by all the courts of this state to be legal until the contrary is affirmatively shown. No action or counterclaim for the recovery of lands sold for taxes shall lie unless the same be brought or interposed within three years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding" (R. 172-173).

The pertinent portions of Section 8508 of the Nevada Compiled Laws, 1929, read as follows:

"No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof" (R. 174, in part).

Section 8512 of the Nevada Compiled Laws, 1929, which is applicable in the instant case, reads as follows:

"In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it shall appear:

1. That it has been protected by a substantial inclosure; or

2. That it has been cultivated or improved in accordance with the usual and ordinary methods of husbandry."

Other statutory provisions having a possible bearing on the instant case, and mentioned in the concurring opinion in the Circuit Court of Appeals, will be found in the Appendix, infra, pp. 20-21.

Statement

From the findings of fact of the District Court, the stipulations and admissions of the parties, and the undisputed evidence, the following material facts appear:

In April, 1913, the United States District Court for the Southern District of New York appointed Henry S. Haskins, a citizen of the State of New York, and the petitioner herein, as receiver for the Tuscarora-Nevada Mines Company, a Maine corporation (R. 156). The order directed "that the business of the said defendant be wound up and its property and franchises be converted into money" (R. 144, Paragraph "Seventh").

In August, 1913, the United States District Court for the District of Nevada appointed petitioner as ancillary receiver of said company, the assets and property of which were principally in Nevada (R. 157).

At the trial of the instant action, when the defendant Roseberry was asked whether he had heard anything about the financial difficulties of the Tuscarora-Nevada Mines Company which led to the appointment of a receiver for it in 1913, he replied: "Yes, I believe I did" (R. 86).

Receiver's certificates, approximately $75,000.00 in amount, issued by petitioner pursuant to authority duly given, are still outstanding and unpaid (R. 160).

(For brevity's sake, we omit the details as to a purported dismissal of the Nevada receivership action in 1914 (R. 158), its subsequent reinstatement in 1917 (R. 158-160), the filing of reports by the receiver in both the Nevada and New York receivership proceedings in 1917 (R. 160), the marking of the New York proceedings off the trial calendar, under Equity Rule 57, in 1918, and the

subsequent dismissal of those proceedings in 1927 because no application for reinstatement to the trial calendar was made within the time allowed therefor (R. 160-161). Those things have become immaterial in view of the admission by defendants' counsel, at the oral argument in the Circuit Court of Appeals, "that the tax deed here involved was invalid because the sale was made during the active administration of the property by the federal court" (R. 217-218).)

On March 6, 1928, petitioner filed an affidavit, in lieu of an account, in the New York proceedings praying to be "relieved from any further duties as receiver," and asking to be relieved from further liability on the bond he had given therein (R. 147-149); but the order entered thereon merely released the sureties on the bond from "any and all liability" under it (R. 145, 161).

Petitioner admittedly continued to perform his duties as receiver until 1929, but because of the deteriorated condition of the property was unable to obtain the financial assistance required to rehabilitate or operate it, or any offers for it "which were commensurate with the actual value of the same" (R. 42-43, 162); and therefore, on February 16, 1929, he tendered his resignation as ancillary receiver in a report filed that day in the Nevada proceedings (R. 58-60). That report advised the Court that "said Ancillary Receiver has not sold said mining claims, or any part thereof" (R. 59).

On February 18, 1929, the Nevada court accepted the resignation of petitioner, and released both him and the surety on his Nevada bond from "further liability" (R. 162-163); and on April 3, 1929, the Nevada court entered another order releasing petitioner and the surety on his bond from "liability" (R. 129-130).

In the meantime, the properties involved in this action were sold, on July 17, 1922, for delinquent 1921 state and county taxes, in full accordance with the revenue statutes of the State of Nevada, to the defendant Roseberry and his

then partners (R. 166); and on July 19, 1923, a tax deed "regular in form and in accordance with the statutes of the State of Nevada" was executed and delivered to the purchasers at the tax sale (R. 166).

The properties so sold include a town lot, buildings, a water works and pipe line, water rights, and mining claims (R. 165-166). The mining claims had been patented (R. 37).

Said tax sale was held, and said tax deed executed and delivered, without notice to the receiver or to the court in either of the receivership proceedings, and without authorization from, or the consent or approval of, either of the receivership courts (R. 6, 17, 41, 169-170).

Petitioner had no notice of the tax sale, or of the execution and delivery of the tax deed, until shortly before the commencement of this action (R. 170).

Neither the proofs offered at the trial of this action, nor the stipulations or admissions of the parties, show that any order was made or entered at any time in either of the receivership proceedings disposing of the receivership assets, or directing that they be returned to the Tuscarora-Nevada Mines Company (R. 170-171).

The defendants have admitted that the properties so sold for taxes were in custodia legis at the time of the tax sale (R. 5, 17, 171); and that the tax deed issued pursuant to such sale was therefore invalid (R. 217-218).

The defendant Roseberry admitted, at the trial of this action, that "mining had been quiet for a good many years" at the time of the tax sale (R. 88).

Until an undivided one-half interest in the tax title was conveyed to the defendant Thatcher, any rights that may have been created by said tax sale and deed remained at all times in the defendant Roseberry, or one or more of his partners in the tax purchase (R. 171-172); and the defendant Thatcher does not claim to be an innocent purchaser of the interest conveyed to him (R. 80-81, 172).

Since July 19, 1923, the defendant Roseberry, first with and then without his partners, and more lately with the

defendant Thatcher, has been in actual occupancy of all of the property so sold for taxes, has paid all taxes subsequently levied and assessed thereon, has been working the mining claims in the usual and customary mode of holding and working similar claims in the vicinity thereof, and has operated and maintained the water works and pipe line (R. 167-169); and has held and occupied all of said property openly, notoriously and adversely at all times since said July 19, 1923 (R. 168-169).

The taxes so paid by the defendants up to the time of the trial amounted to $852.09 (R. 49-50); but during the first four years after Roseberry took possession the assessed valuation of the property declined from $6,325.00 to $1,950.00, at which figure it has remained ever since (R. 49-50).

Since July 19, 1923, the defendants have expended in excess of $57,000.00 on the property involved (R. 169), all of which, except approximately $1,500.00, was for operating expenses of automobiles, feeding and care of horses, wages of certain employees, and the value which the defendant Roseberry placed on his own time (R. 95-100).

The only portion of defendants' expenditures which is reflected in any permanent and beneficial improvement to the property is the sum of $750.00 spent on purchasing, freighting in and installing some 300 feet of steel pipe at the head of the pipe line (R. 97-98). There is no testimony as to the amount, if any, by which this pipe has enhanced the value of the property.

Up to the time of the trial, the defendants have collected cash revenues from the property of $717.16 from their mining operations (R. 99, 109), and approximately $3,953.00 from the sale of water (R. 99). Roseberry has personally used water, up to the time of trial, the cost of which to any other user would have been $588.00 (R. 108).

Because of the recent increase in the price of silver and gold, which are found on the property here involved, certain

interests, including the Princess Mining Company, owner and holder of most of the receiver's certificates issued as aforesaid, became interested in those properties (R. 10-11, 20). This led to the discovery of the tax sale and deed. Petitioner's representative offered to pay the defendant Roseberry the sum of $1,000.00 in May, 1936 (R. 102), to get rid of any claim he might assert because of the tax deed. At that time, the total taxes paid by the defendants aggregated only $767.07 (R. 49-50). This offer was not accepted (R. 103).

Thereafter, on October 9, 1936, petitioner sought, and obtained, from the New York court permission to file a new bond in the New York receivership proceedings, so that he might take steps to recover the property so sold for taxes (R. 114-121, 163-164); and on December 21, 1936, he sought, and obtained, from the Nevada court reinstatement as ancillary receiver, and express permission to bring this action to remove the cloud on title created by said tax sale and tax deed (R. 61-69, 133-139, 163-164).

This action was commenced on May 17, 1937; and tried by the court, without a jury, on November 22 and 23, 1938. At the close of the trial, petitioner tendered to the defendants, in open court, the amount they had paid as taxes on the property, together with interest on each of the several tax installments from the dates on which they were respectively paid to the date of the said tender, at the Nevada statutory rate of seven per cent per annum (R. 150). The defendants made no reply to the tender (R. 150-151).

The District Court held (R. 173-175) that petitioner was barred from maintaining this action by laches and by the statutes of limitation contained in Sections 6449 and 8508 of the Nevada Compiled Laws, 1929 (ante, pp. 3-4); and decreed (R. 176-177) that petitioner's complaint be dismissed with prejudice, and that the title to the property involved be quieted in the defendants.

The Circuit Court of Appeals affirmed the decree of the District Court (R. 206-225), holding that the legislature of

Nevada has the power to dispense with the requirement that the consent or approval of the Federal Court must be obtained before property held in the custody of courts of the United States may be sold for state taxes, and therefore this action is barred by the limitation contained in said Section 6449 of the Nevada Compiled Laws, 1929.

The opinions filed in the Circuit Court of Appeals contain certain statements of fact which are either unsupported by the record herein or are contrary to facts established by uncontradicted testimony or by findings of the District Court. They are:

The majority opinion applies Rule 15(b) of the Federal Rules of Civil Procedure (R. 211-212) on the unsupported statement of counsel for the defendants, made at the oral argument in the Circuit Court of Appeals, that this case had been tried on the express or implied consent of the parties that the statute of limitations had been pleaded as a defense. This statement was untrue. None of the evidence offered by the defendants could have been objected to successfully, on the ground that this defense had not been pleaded, as all of that evidence was admissible either under the plea of laches or the defendants' denial that petitioner was the duly appointed, qualified and acting receiver for the Tuscarora-Nevada Mines Company.

The concurring opinion states (R. 218) that petitioner had knowledge of, and acquiesced in, the defendants' possession of the property here involved, and their activities thereon. The District Court found that petitioner had no notice of the tax sale, or tax deed, until shortly before the commencement of this action (R. 170).

The concurring opinion states (R. 220) that "without additional funds the property would be lost by the failure to do assessment work." The defendants expressly admitted that the mining claims here involved were patented (R. 37, Paragraph 8). Assessment work is not required on patented mining claims.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding and deciding that the legislature of the State of Nevada could dispense with the requirement that consent or approval of the Federal Court must be obtained before property held in custody by a court of the United States may lawfully be sold for delinquent state taxes.

2. In holding and deciding, as a consequence of the foregoing, that the limitation contained in Section 6449 of the Nevada Compiled Laws, 1929, is a bar to this action.

3. In holding that Rule 15(b) of the Federal Rules of Civil Procedure is applicable in this action; and that therefore judgment and decree may be entered in favor of the defendants notwithstanding their failure to plead such defense.

4. In holding and deciding, in effect, that title to property may be gained by adverse possession while it is held in custody by a court of the United States.

5. In ignoring the provisions of Sections 8508 and 8512 of the Nevada Compiled Laws, 1929, and the construction which the Supreme Court of Nevada has placed on said Section 8508.

6. In holding and deciding, in effect, that a tax deed, which is admittedly void for jurisdictional reasons, can furnish a basis for a decree that title to property has been gained by adverse possession under color of title.

7. In affirming the decree of the District Court.

Reasons for Granting the Writ

1.

The decision below conflicts with decisions of this Court, and of the Supreme Court of Nevada. It has been firmly established that when a court has appointed a receiver, and through him has taken property into its custody and possession, that property may not be taken and sold, even for taxes, without the consent or approval of such court. *Ex Parte Tyler,* 149 U. S. 164, 37 L. Ed. 689, 13 S. Ct. 785; *Dayton* v. *Stanard,* 241 U. S. 588, 60 L. Ed. 1190, 36 S. Ct. 695.

The local law in Nevada is to the same effect. In *Irving National Bank* v. *District Court,* 47 Nev. 86, 217 Pac. 962, the Supreme Court of Nevada said:

> "Intervention in receivership proceedings is the proper remedy in the case of liens for taxes, which are held to be paramount to all other liens, except judicial costs. In Re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689." (47 Nev. 93.)

In a number of other cases this Court has held that when property is in the custody of a court, whether state or federal, it may not be taken from such custody, or interfered with, by any other agency, either state or federal, except upon the consent or approval of the court having such custody. For example, see: *Taylor* v. *Carryl,* 61 U. S. (20 How.) 583, 15 L. Ed. 1028; *Covell* v. *Heyman,* 111 U. S. 176, 28 L. Ed. 390, 4 S. Ct. 355; *Wiswall* v. *Sampson,* 55 U. S. (14 How.) 52, 14 L. Ed. 322.

The property here involved was in the custody of a court of the United States, and therefore the decision of the Circuit Court of Appeals that the legislature of the State of Nevada could dispense with the requirement that consent or approval of such court must be obtained before that property could lawfully be sold for taxes not only conflicts with the aforesaid decisions of this Court, but it amounts

to a holding that the powers and jurisdiction confered upon the courts of the United States by Article 3, Section 2, Clause 1, of the Constitution of the United States may be undermined and eroded, if not actually ousted in toto, by the action of state legislatures.

In *Board of Commissioners of Jackson County, Kansas* v. *United States,* 308 U. S. 343, 350, 60 S. Ct. 285, 288, 84 L. Ed. 313, this Court said:

> "Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated."

A further reason for granting the writ of certiorari in this case is the strong criticism of the majority's decision on this point found in the concurring opinion in the Circuit Court of Appeals (R. 217).

This case does not fall within the embrace of the Act of June 18, 1934, c. 585, 48 Stat. 993, 28 U. S. C. No. 124(a), because the taxes for which the property was sold accrued prior to June 18, 1934, and the "United States court having final jurisdiction of the subject matter under existing law" did not "adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same".

2.

The decision below, that this action is barred by the statute of limitations contained in Section 6449 of the Nevada Compiled Laws, 1929, conflicts in principle with decisions of this Court. Counsel for the defendants admitted, at the oral argument in the Circuit Court of Appeals, that the tax deed upon which they base their claim of title was "invalid because the sale was made during the active administration of the property by the federal court" (R. 217-218). In *Moore* v. *Brown,* 11 How. 414, 13 L. Ed. 751, and later in *Redfield* v. *Parks,* 132 U. S. 239, 33 L. Ed. 327, 10 S. Ct. 83,

this Court held that tax deeds which were void because the tax sale was held on a day not authorized by law would not support the tax deed holder's claim of title by adverse possession for the period specified in the statute of limitations, even though the power of the state to sell for taxes was unquestionable in both of those cases. The instant case is a stronger one than either of those cited, because here the power to sell was completely lacking in the absence of consent to or approval of the tax sale by the court holding the property in custody. See also: *Black on Tax Titles,* Section 283.

3a

In holding and deciding that it was unnecessary for the defendants to plead affirmatively the defense of the statute of limitations, despite the requirements of Rule 8(c) of the Federal Rules of Civil Procedure, the court below accepted the unsupported statement of counsel for the defendants that this case had been tried on the express or implied consent of the parties that such defense should be treated as if it had been pleaded. The record shows that this statement is untrue.

This Court has not announced the extent to which Rule 8(c) is obligatory, but the decisions of the lower federal courts indicate that it means what it says—that the defenses therein mentioned must be pleaded affirmatively by a defendant who wishes to obtain the benefit of them. See: *Bridges* v. *Dahl* (C. C. A., 6th), 108 F. 2d 288; *Dinan* v. *First National Bank of Detroit* (C. C. A., 6th), 117 F. 2d 459; *Frederick W. Huber, Inc.* v. *Pillsbury Flour Mills Co.,* 30 F. Supp. 108; *Munzer* v. *Swedish American Line,* 30 F. Supp. 789; *Thierfeld* v. *Postman's Fifth Avenue Corporation,* 37 F. Supp. 958; *Continental Illinois National Bank & Trust Co.* v. *Ehrhart,* 1 F. R. D. 199; *Dirk Ter Haar* v. *Seaboard Oil Co. of Delaware,* 1 F. R. D. 598.

4.

The decree of the court below in effect decides that one may gain title to property, by adverse possession, while a court of the United States is holding that property in custody. This is an important question of federal law which has not been, but should be, settled by this Court.

There are only a few decided cases dealing with the point, but they are in agreement that property in custodia legis cannot be acquired by adverse possession. *Ewin* v. *Lindsay* (Tenn. Chan. App.) 58 S. W. 388; *McAllen* v. *Crafts* (Tex. Civ. App.), 139 S. W. 41. The property here involved was admittedly in the custody of a court of the United States at the time of the tax sale on which the defendants base their claim of title (R. 171).

5.

The decision of the Circuit Court of Appeals fails to comply with the requirements of Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 1 Stat. 92, 28 U. S. C. No. 725, 28 U. S. C. A. No. 725, in that it fails to give effect to statutes of the State of Nevada, and particularly to Sections 8508 and 8512 of the Nevada Compiled Laws, 1929, ante, p. 4, as well as to the construction placed on said Section 8508 by the Supreme Court of Nevada.

Section 8508 provides that no action for the recovery of mining claims shall be maintained, "unless it appear that the plaintiff, or those through or from whom he claims, were seized * * * of such mining claim, * * * within two years before the commencement of such action." In *South End Mining Co.* v. *Tinney,* 22 Nev. 19, 35 Pac. 89, the Supreme Court of Nevada construed this statute, and said: "the word 'seized' means something different from simple possession of a claim, or of a holding of it in accordance with the laws and customs of miners. If so, it must

mean, as it would naturally import, an ownership in fee, for this is the only other kind of ownership known to the law" (22 Nev. 35-36). This is no mere dictum. *Six Companies of California* v. *Joint Highway Dist. No. 13,* 311 U. S. 180, 85 L. Ed. Adv. Ops. 159, 61 S. Ct. 186. In *Wiswall* v. *Sampson,* 55 U. S. (14 How.) 52, 14 L. Ed. 322, held that a sale of property on execution, while it was in receivership, made without leave of the court having the property in custody, was "illegal and void, and passed no title to the purchaser."

Under these decisions, no title passed to the defendants here by virtue of the tax deed under which they claim, but which they admit to be void, and therefore the Tuscarora-Nevada Mines Company remained "seized" of the property within the meaning of that word in said Section 8508, as so construed by the Supreme Court of Nevada. It follows that the petitioner, as receiver for that company, may maintain this action.

Section 8512 of the Nevada Compiled Laws, 1929, provides that in every action for the recovery of real property the person establishing legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and that the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that the property has been protected by a substantial inclosure, or has been cultivated or improved in accordance with the usual and ordinary methods of husbandry. This is in addition to the payment of taxes by the occupant, as required by Section 8517 of the Nevada Compiled Laws, 1929 (Appendix, post, p. 21). The requirements of these two sections are cumulative, and they must be read together. Indeed, they were formerly combined in one section. See: Section 3709 of Cutting's Compiled Laws of Nevada, 1900; *Reno Brewing Co.* v. *Packard,* 31 Nev. 433, at 440-441, 103 Pac. 415, 104 Pac. 801. There is no proof here, nor even a suggestion, that the property involved has

been so inclosed, cultivated or improved, or that it can be adapted to the uses of husbandry. Petitioner has clearly established legal title to the premises, under the authorities heretofore mentioned.

In *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860, this Court held that Section 34 of the Federal Judiciary Act controls the courts of the United States in suits in equity as well as in actions at law; and in *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201, this Court held that it was applicable to a suit in equity to remove a cloud on title created by an equitable interest.

The Nevada statutes mentioned, and the construction of one of them by the Supreme Court of Nevada, established a rule of decision binding on the lower courts in this case, quite independent of the pronouncements of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. Adv. Ops. 176, 61 S. Ct. 176; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 85 L. Ed. Adv. Ops. 146, 61 St. Ct. 179; *Six Companies of California* v. *Joint Highway Dist. No. 13 of State of California*, 311 U. S. 180, 85 L. Ed. Adv. Ops. 159, 61 S. Ct. 186.

6.

Under the decisions of this Court the petitioner is not barred from maintaining this action by the doctrine of laches. To justify the application of that doctrine there must be something more than mere lapse of time; delay in bringing action must be accompanied by some factor, such as loss of evidence, change of title, intervention of innocent equities, or large increase in the value of the property involved, which would make it inequitable to grant plaintiff the relief sought because prejudice to the defend-

ant would result. *Galliher* v. *Cadwell,* 145 U. S. 368, 36 L. Ed. 738; 12 S. Ct. 873; *Halstead* v. *Grinnan,* 152 U. S. 412, 38 L. Ed. 495, 14 S. Ct. 641; *Townsend* v. *Vanderwerker,* 160 U. S. 171, 40 L. Ed. 383, 16 S. Ct. 258; *Penn Mutual Life Ins. Co.* v. *Austin,* 168 U. S. 685, 42 L. Ed. 626, 18 S. Ct. 223; *O'Brien* v. *Wheelock,* 184 U. S. 450, 46 L. Ed. 636, 22 S. Ct. 354; *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, 57 L. Ed. 931, 33 S. Ct. 554.

The local law in Nevada is to the same effect. *Cooney* v. *Pedroli,* 49 Nev. 55, 235 Pac. 637.

In *Pond Creek Coal Co.* v. *Hatfield* (C. C. A., 6th), 152 C. C. A. 456, 239 Fed. 622, it was held that the plaintiff was not chargeable with laches when he did not know of the claims of the defendant until shortly before he commenced his suit, although they were based on a deed executed and recorded more than 21 years previously.

In the instant action, the District Court found that petitioner had no notice of the tax sale and deed until shortly before this action was commenced (R. 170). Until *Ex Parte Tyler,* 149 U. S. 164, 37 L. Ed. 689, 13 S. Ct. 785, ceases to be the law he has the right to assume that no tax sale of the property here involved can lawfully be held without the consent or approval of the court holding it in custody; and that if application for such consent or approval is made, in the course of practice in suits in equity notice will have to be given to him as the receiver for the Tuscarora-Nevada Mines Company.

The defendants here have suffered no prejudice. There has been no claim of loss of evidence. There has been no change of title, except the conveyance to the defendant Thatcher, and he admits that he is not an innocent purchaser of the interest conveyed to him (R. 80-81, 172). No innocent equities of any kind have intervened since the tax sale was held and the tax deed was executed and delivered. The property has not increased in value, but on the contrary, its assessed valuation is now less than one-

third of what it was at the time the defendant Roseberry first went into possession of it; and the improvements of a permanent character which the defendants have made thereon are of inconsequential value.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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